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# A Personal Memoir of Plaintiffs' Co-Counsel in Keyes v. School District No. 1

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A Personal Memoir of Plaintiffs' Co-Counsel in Keyes v. School District No. 1

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# A PERSONAL MEMOIR OF PLAINTIFFS' CO-COUNSEL IN *KEYES V. SCHOOL DISTRICT NO. 1*

CRAIG BARNES[†]

ABSTRACT

After the killing of both Martin Luther King Jr. and Robert Kennedy Jr. in 1968, an intense debate erupted in Denver over the issue of school desegregation. In April of that year, Denver public school board member Rachel Noel introduced to her board Resolution 1490, which instructed the superintendent to develop "a comprehensive plan for the integration of the Denver Public Schools. This resolution was passed by the board in May 1968 and became the focal point of public hearings that took place in the autumn of that year. In January 1969, Noel and her supporters then introduced three resolutions, numbered 1520, 1524, and 1531, that would initiate an integration program to become effective on September 1, 1969. These three resolutions would require re-assignment of a limited number of students in northeast Denver with the intent to achieve racial integration in certain schools that had become increasingly segregated in previous years.

Resolutions 1520, 1524, and 1531 became the subject of intense debate during the spring of 1969 both in the meetings of the school board and in the community at large. The debate was intensified by an election campaign during that same period to fill two positions on the school board. By May 16, 1969, all three resolutions had been adopted, but four days later, on May 20, two new opponents of the integration plans were elected to the board. The newly constituted board then rescinded all three resolutions at its first meeting. The board's action of rescission became the basis for the lawsuit filed by eight minority plaintiffs in mid-June 1969 alleging intentional resegregation. Plaintiffs' case consisted additionally of evidence of school boundaries, school constructions, discriminatory use of mobile units and bussing, and differing achievement expectations based upon race. The case for a preliminary injunction to prevent the intended resegregation was heard before federal district Judge William Doyle in late July 1969. After five days of trial, Judge Doyle granted the motion for preliminary injunction halting the enforcement of the May 20 rescission. Defendant school district next sought a stay from the U.S. Court of Appeals for the Tenth Circuit, which issued

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an interim suspension of the preliminary injunction, instructing Judge Doyle to take into consideration the Civil Rights Act of 1965. After a second hearing, Judge Doyle affirmed his earlier order, and the case was taken a second time to the Tenth Circuit. Midweek in the last week preceding schools' opening, this court reversed, again staying Judge Doyle's order. Plaintiffs then filed a motion to vacate this stay in the United States Supreme Court, where on Friday preceding the Monday of schools' opening, Justice Brennan reversed again, reinstating Denver's integration plan.

The following year, following a three-week trial on the merits, Judge Doyle again held for plaintiffs, setting the stage for a second round of appeals, eventually leading again to the United States Supreme Court. The case had additional consequences in the civic history of Denver when the outcome of two subsequent Denver elections was determined by association of potentially winning candidates with the *Keyes* case.

The ultimate success of the *Keyes* case in raising academic achievement or long-term school desegregation may today be questioned. The triumph, however, of these plaintiffs, at this time in the nation's history, in a school district outside the South, and through the courts rather than the streets, was of powerful symbolic significance. *Keyes* demonstrated the possibility of success through constitutional processes for people who had come to believe that such processes would never work for them. This was, therefore, a victory for democracy.

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## I. THE BUILD-UP: 1968–1969

Things are forgotten in the course of forty years, names of key players, case citations, critical statistics, someone's crowning cross-examination. What I do not forget is how Judge Doyle sensed my inexperience and midway through my second witness threw his hand to his forehead and exclaimed to opposing counsel, "Oh, Brother. Do you object to that question?"

We forget some things, but I don't forget that.

"It t'ain't fair" was our motto, handwritten on a sign by George Bardwell, our statistician. George put that sign over our war room door. We had to do this thing, he said, because it wasn't fair to have black students' performance treated as acceptable when only performing in the eighteenth percentile while whites in other schools were urged to perform in the seventieth or eightieth percentile. It wasn't fair to excuse

children of color because, as Denver Public Schools had written in its reports words to the effect that "the eighteenth percentile is as good as can be expected from these children in these conditions." It wasn't fair to treat race as a tracer for poverty and equate poverty to ineptitude, or to set expectations so low that they became self-fulfilling. It wasn't fair to bus blacks forty-five minutes from northeast to southwest Denver and at the same time to support white parents who bitterly resisted any bussing of their own. Most significantly, it wasn't fair to move school boundaries east across the northern tier of the city tracking black migration as it also moved across that part of the city, consistently having the effect of returning black children into predominantly segregated schools, taking them out of white schools.

Briefs and motions, pleadings, and appeals completely filled four filing drawers in the first three months of the summer of 1969. Added to these were the multiple rolled maps of the city and the school district boundaries, all stored in the war room, and to these were added the multiple boxes of computer printouts with census data from the 1930s forward. The *Keyes* case consumed a lot of paper.

The year before the trial, in April 1968, I was sitting as a junior associate in my office at Holland & Hart and heard the awful news that Martin Luther King Jr. had been murdered. The country had been through several burning years, and the Vietnam War was spawning widespread chaos. Anti-war sit-ins and street fires had erupted in cities all over the country. With Dr. King's shooting, whole blocks were set afire in Washington, D.C.,[1] and a candlelight march took place in Denver. That spring, a certain madness was in the air.

A group that named itself Citizens for One Community (COC) emerged and organized large gatherings to consider whether, in honor of Dr. King, something could be done about Denver's racially divided schools. Leaders of that organization went from meeting to meeting trying to teach liberal Denver how to react nonviolently. We all thought that something historic was going on, not only in the rest of the country, but also in Denver.

In June 1968, Bobby Kennedy was killed. The country descended into a rage about how both he and Martin Luther King Jr. could be taken away, killing not only the individuals but also great dreams. Then came the Democratic National Convention in Chicago in the summer of 1968; a travesty of rage and reaction, riots in the streets, protestors thrown through plate-glass windows, and fires and crowds storming toward the convention center.[2] Hubert Humphrey was nominated and among those

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1. *Widespread Disorders: Racial Clashes in Several Cities*, N.Y. TIMES, Apr. 5, 1968, at 1.

2. R.W. Apple, Jr., *Daley Defends his Police; Criticism Angers Mayor*, N.Y. TIMES, Aug. 30, 1968, at 1.

of us who had been ignited by Dr. King and Robert Kennedy, despair hung heavy in the air.

Spurred by this national upheaval, in the autumn of 1968 a small group of lawyers with whom I was involved began organizing gatherings to interview potential candidates for the upcoming Denver Public Schools board election. We would seek someone who would vote for integration. Elections were to be held in eight months, in May 1969. As we found out, not everyone thought it a high honor to be considered. A campaign for integration could very well be political suicide.

During this same period, the COC attempted to persuade the existing school board to make a decision reversing the increasing pattern of segregation in Denver's schools. The COC urged passage of plans that would implement the Noel Resolution of the preceding May 1968. In January 1969, these plans were offered in three resolutions numbered 1520, 1524, and 1531. Rachel Noel, a black member of the school board and a woman of extraordinary grace and dignity, was the leader in the effort, and the resolutions were considered sequentially from January through May 1969. Noel was joined in support of these resolutions by two other board members, but passage would require a fourth. A huge campaign was mounted by the COC. The school board scheduled weekly meetings in high schools in various parts of town.

The city was desperately divided. As black consciousness was rising all over the nation, so too was there an increasing demand that the school board recognize Hispanic culture. The Latino population of Denver was not as interested in school integration as it was in equal financial and curriculum support, including especially greater recognition that Spanish settlers had been in the State of Colorado for hundreds of years, much longer than most Anglos. A group that identified itself as La Raza Unida erupted out of the west side of Denver demanding reform. But La Raza did not want *integration* reform. It wanted more independence and, if possible, more separation rather than less. La Raza's leader, militant Hispanic Corky Gonzales, led his supporters to those schools where the school board was holding hearings. When Gonzales spoke, he marched to the podium with a cluster of bodyguards. He demanded to know how the board intended to correct the abuses of history. One particular night at South High School, the members of the board majority were so insulted, and probably frightened, that they left the stage, simply walking out of the meeting. Gonzales was left standing at the podium surrounded by bodyguards, all of them facing outward, stony-faced, and glaring at an audience of mostly Anglos. Only one board member, James Voorhees, did not leave the stage. With his back to Voorhees, Gonzales made a passionate speech to the packed auditorium. The speech crackled with threats and tension. When it was over, only a few Anglos went out into the parking lot. The rest waited until Gonzales was long gone.

Pressure mounted on school board member James Voorhees to vote yes on the resolution. Through January, February, and March 1969, the emotionally charged hearings in the schools continued. Simultaneously, the small group of lawyers that had been looking for candidates for the May board elections settled on two: Monte Pascoe and Edgar Benton. Each agreed, in effect, to risk promising political careers to come out in favor of the integration resolutions. If they lost this election, they would not be likely to have political futures, either one of them.

During the course of the spring of 1969, board member James Voorhees became convinced to vote for the three resolutions that integrated a small cluster of Denver's schools in the northeast part of the city. On May 16, the last of the three integrating resolutions was passed, with Voorhees' support. That night, there was joy amongst a small group of black and white friends who gathered to sing and dance under the cottonwoods in Park Hill. But there was horror in the rest of town.

On May 20, the school board elections were held and the integration candidates Pascoe and Benton were defeated by a 2–1 margin. Pascoe and Benton had become sacrificial lambs.

The new school board had its first meeting three weeks later. The boardroom was filled to overflowing; a crowd had gathered as if to attend a public execution. The newly elected members repealed Resolution 1520, 1524, and 1531 with dispatch.

By this time, I had left Holland & Hart and decided to go back to school to work toward a Ph.D. in international relations. It was June 1969; I was preparing to study for my oral examinations at the Graduate School of International Studies at the University of Denver. For appearances sake and to keep my spirits up, I had maintained a one-room law office near the university. The morning after the school board repealed the integration resolutions, Bob Connery, another Holland & Hart lawyer, called my office. He had been doing legal research for many months on the possibility of a lawsuit that could be brought against the school board for intentional segregation. Through the course of the year, Bob remembers that he had been a strong advocate of litigation. My recollection is that his advocacy had been met by others with measured interest and considerable skepticism. Bob would say, "Well, there is this case in Pasadena and this one in White Plains. You know, maybe we could win this thing." Now, after the rescission of the resolutions, the case should be much stronger, and other lawyers with whom he was meeting, he said, were in agreement.

Connery asked if I would work with these others on a draft complaint to sue the school board of School District Number 1 on behalf of all those children in Denver who were being denied an equal educational opportunity. He asked me to work on the case over the weekend. It might

be as short as that. On the other hand, if I were to participate in the trial itself, it might be longer.

I was flattered, but when I had been at Holland & Hart, I had had practically no trial experience and was then preparing for orals in international relations. Nevertheless, the case was huge, and I agreed. Connery promised that he was talking to another, more senior trial lawyer, Gordon Greiner, also at Holland & Hart. So that is how, for some of us on the plaintiffs' side, the *Keyes* case began.

## II. THE FIRST ROUNDS IN COURT: MAY–AUGUST1969

Shortly after my conversation with Connery, University of Denver statistics Professor George Bardwell called my office. In anticipation of some action, he and Dr. Paul Klite had been gathering facts for months and probably knew as much about classroom statistics and distribution of students by race as did the school administration itself. Bardwell offered to help with the case. Bardwell, Klite, and I met immediately. Bardwell had collected census data from as far back as the 1930s. He also knew where the school district boundary maps could be located and speculated about a possible connection between movements of the black population and changes in school boundaries.

There was other suggestive evidence. Manual High School in the northern, black part of town had been opened for manual arts in the 1920s but not for college preparation. Because only blacks lived in the area, the decision to open a manual training school showed a school district predisposition about competence based upon race. Why else put the only manual training school in the city in a black area, none in the white areas, and no college preparatory school in the black area?

Barrett Elementary was also suspect. It had been newly constructed in a transition area of vanishing white students who in the 1960s had been attending class at Stedman Elementary on the eastern side of Colorado Boulevard. At Stedman, black students increasingly gathered with the majority white concentration on that eastern side of the boulevard. As the black population began to increase to the west of Colorado Boulevard, the white schools to the east were increasingly picking them up and mixing them with white kids at Stedman. The school district's solution to this increasing integration in Stedman was to build a new school just to the west and put the boundary for that new school down the middle of Colorado Boulevard. That became Barrett Elementary, and when it opened, its student population was 92% black. Blacks who had been attending integrated Stedman Elementary were forced back into a virtually all black school.

Bardwell and Klite also had information about who was already being bussed. Black junior high school students were being transported ten miles from northeast Denver near Stapleton International Airport across

the northern tier of the city to the west side to Lake Junior High School. Lake was predominantly Hispanic. The overcrowding in the Stapleton-area junior high school was not, therefore, solved by bussing students to the nearest junior high school. It was solved by bussing students to the nearest junior high school with a predominately minority population

As promised, Connery enlisted Gordon Greiner, an experienced litigator of antitrust cases in federal district court. Soon, Greiner, Bardwell, Klite, and I met in Greiner's office to study school district maps. As the black population of north Denver had gradually moved east across the northern tier of the city, school boundaries for elementary schools had regularly shifted eastward. The effect was that black children who had moved across boundary lines into white districts could be recaptured by the new lines and brought back into redrawn black districts. Barrett Elementary was just one example. These boundary changes were effectively segregating Denver's schools, and this practice had been going on since the 1920s.

Greiner was conservative by conviction, and my recollection is that when I was first in meetings with him, he was uncomfortable with any accusations of racism. It may have seemed to him to be so much liberal exaggeration. He would not at first allow the conversations to go there. Nevertheless, he was persuaded to lead our team. He was a cool, steady, experienced trial lawyer. For the next nine months, Greiner, Bardwell, Klite, and I were welded at the hip. Klite was a brilliant research physician. Bardwell, the mathematician, could produce the printouts of teacher–student assignments and correlate these with census data. I was a young lawyer-defector holding on for the ride as co-counsel, about to participate in the biggest case of my life.

For the next four months, we saw more of each other than we did of our wives or families, and spent more hours writing, drafting, analyzing the law and the printouts, going out for sandwiches, and coming back to the office than we did of any other activity in our lives. Eventually, perhaps in mid-June 1969, the newspapers got wind that a lawsuit against the school district was in the offing. Greiner was adamant. "Don't try the case in public," he said. "Save it for court." Reporters were calling. "We are considering some action," Greiner said. Greiner and I began to draft sections of the complaint.

In this, and in the research of the cases around the country, we were greatly aided by a team of volunteer lawyers that included Bob Connery, Larry Treece, Ed Kahn, and a number of others from some of the best firms in Denver. As the complaint was being drafted, they fed their analyses to Greiner, who was preparing the lion's share of the legal argument.

One day, probably in early July 1969, Greiner called the school district and asked what would be its deadline if a court were to order it to

change the boundary lines back and put into effect the boundaries of the integration resolutions. I do not remember the exact date that the district told us. The school district definitely, however, gave us the impression that it would need a court order very soon—my impression was that the district wanted it very soon, perhaps by July 31. The district pled urgency because it would take time to arrange bus schedules and teacher assignments.

"OK," Greiner said, "we will be back to you."

Dr. Wilfred Keyes was a quiet, soft-spoken, tall, good-looking black man, and the father of two children who attended the Denver Public Schools. To be in his presence was to be calm. He had been interested in integration, in principle, he said, and was willing to be the lead plaintiff for the Denver suit. He and his family would stand in for the class of all Denver's children who were being deprived of an equal educational opportunity. Eventually, he was joined by seven other parents from both black and Hispanic families. As we were getting acquainted one afternoon in the Holland & Hart conference room, surrounded by law books and stacks of computer printouts, Dr. Keyes clearly understood that his role would be controversial. He was willing, he said. The case would be styled, we told him, *Keyes v. School District No. 1*.

Dr. Keyes nodded and said softly, "All right."

Just "all right." One had the feeling that here was a person of deep tenderness and concern, and that he would be willing to help because that is what concerned people do. At the time, none of us knew how much we were asking of him or how dangerous it would turn out to be.

We worked through the first weeks of July and had a complaint drafted by mid-month. One day we filled our briefcases and marched ceremoniously onto Seventeenth Street and down to the federal courthouse. In the draw of judges, we were assigned William E. Doyle. He was a democrat, maybe even liberal. It was terrific luck.

The filing hit the front pages. Banner headlines: Eight Denver children and their parents sue the school district for segregation of Denver's schools based on a pattern of intentional conduct over a period of years leading to widespread racial discrimination and inequality of educational opportunity. Plaintiffs claim that they have been denied their rights under the Fourteenth Amendment of the U.S. Constitution. Plaintiffs are sorely aggrieved.

So was the rest of Denver. Controversy exploded. At home, my family started getting our first hate calls, callers in the middle of the night. Our lives, all of us, and those of the plaintiffs, especially the Keyes family, had become suddenly public. Two-thirds of the voters of Denver had voted against the candidates who supported the integration resolutions, and a small minority was about to try to reinstate the integration

option. It was not right, said the majority. It was what the Constitution required, said the plaintiffs. It was not what the Constitution required, and elections should not be upset by the courts, said the majority. All this debate raged in the offices, on the streets, and on the editorial pages of Denver's newspapers.

This was high drama and I had, by some happenstance of nature, landed right in the middle of it. Eventually, I became our spokesperson to the press. We filed a motion with Judge Doyle requesting an immediate hearing because the school district itself wanted speed. It had to have an answer —probably by July 31—so the hearing had to be soon. We asked for five days of trial. Then we turned to making exhibits, graphs, and charts showing racial attendance at all of Denver's northeast sector schools, trends over the years, the census data, and the flows of population across the northern tier of the city. Judge Doyle said that he could hear the case beginning July 16. The school district's lawyers protested that that was too soon for them to be prepared. They were probably right. We had filed a forty-page complaint, together with a few hundred pages of computer printouts, maps, and color-coded census flow charts. Our documents were detailed and probably inexplicable without a witness to explain them, so giving them the exhibits did not tell them very much. The district appropriately asked for more time.

"You said you had to know soon," said Judge Doyle, setting the trial date.

Two days before trial, Gordy and I worked through the whole night preparing arguments, lists of questions for witnesses and cross-examination, copies of exhibits, opening argument, and briefs on the law. Gordy was the primary brief writer; I was his lieutenant.

Gordy was a veteran: tough, disciplined, and experienced in front of Judge Doyle. We spent that night working through the final documents and then the next morning left copies for our colleagues to help with the copying and cataloguing. By this time, we had volunteer lawyers and friends coming in from all over Denver, helping with every kind of detail. The COC was rallying legal assistance, money for copying, some legal fees, and hundreds of hours of volunteers in addition to Klite and Bardwell. The day before trial, the volunteers took over completing the exhibits, and Greiner and I went home to sleep.

The next morning at 9:00 a.m., we appeared in federal district court. When Greiner got up to make his opening statement, the courtroom was jam-packed and hushed. All of Denver was apparently in there, and quiet. Greiner told Judge Doyle:

> This is a class action brought to redress the denial of the equal protection of the laws of the Fourteenth Amendment. Plaintiffs [are those] who . . . would have been assigned to integrated schools had Resolutions 1520, 1524, and 1531 . . . been implemented.[3]

Greiner said that the plaintiffs wanted a preliminary injunction that would mandate reinstating Resolution 1520, 1524, and 1531. Judge Doyle sat back, skeptical, but listened. He dropped his white head in his hands and looked at Gordy cautiously, but he let the argument go forward. After about an hour, it became clear he was going to let us go to our evidence.

It didn't help plaintiffs' cause that all the town was in a rage about our being there, and Judge Doyle knew that as well as anyone else. He had a hornet's nest on his hands. He was obviously skeptical, but Greiner had persuaded him to listen.

Gordy led off with our first witness, Rachel Noel, the stately and dignified black school board member who had offered Resolution 1490 in May 1968, the resolution that had started the whole sequence of events pressing toward integration. Her testimony went in very well. Then came Edgar Benton, himself a former board member and a solid supporter of school integration. He was my witness. I was on my feet in federal district court for the first time. It must have showed. But Ed did his job, and we got through that sequence without peril. He spoke to the history of efforts to move Denver toward integration. Objections from opposing counsel were not sustained. Next came James Voorhees, also a former board member and again my witness. I asked him what in his judgment had been the focus of the school board elections that had led to the defeat of Benton and Pascoe and the rescission of the resolutions. That's when the roof fell in.

"Oh brother. Do you object to that question?" asked Judge Doyle.

"Yes, I do your honor, I don't think that this is a proper question of a lay witness."[4]

For a seasoned lawyer, this might not have seemed like much. For me, this was clear evidence that I was new in the courtroom and the humiliation of having the judge make the objection doubled the embarrassment. The matter was of little moment for the trial as a whole. It will always, however, be a vivid part of my experience of the *Keyes* case. The court urging opposing counsel to object to an error that was obvious to everyone but me.

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3. Transcript, vol. I, at 17, Keyes v. Sch. Dist. No. 1, No. C-1499 (D. Colo. July 16, 1969) (testimony of Gordon Greiner) (on file with Archives, University of Colorado at Boulder Libraries).

4. *Id.* at 116.

Midway through the first day, Greiner examined Dr. Paul Klite on school attendance records, and in the afternoon I examined Dr. George Bardwell on census data, attempting to make the correlations between census data and enrollment records. The graphs and charts of these two witnesses moved the case off the emotional story and into the facts showing how the school district had changed the boundaries to accord with black population movements. This solid statistical and census data took about two days of trial. Klite's charts easily went into evidence. Exhibits offered; exhibits accepted.

"I think, though," Judge Doyle said to me on the second day while I was offering the Bardwell census exhibits, "we ought to make an inquiry about where we are going here. Have you changed your plans? Have you now decided to throw everything but the kitchen sink into this hearing, or including the sink?"[5]

Without Bardwell's census data, Klite's enrollment information would prove little. But if enrollment was combined with census data, we could demonstrate that as soon as blacks moved into previously all-white census districts, they were pulled back into black schools. Together, the two kinds of data were complementary. But if Judge Doyle considered the census to be "the kitchen sink" and denied its admission, we were in deep trouble. Now he was threatening to do just that.

I told the judge that we needed the past census and corresponding boundary changes to prove the intention of the rescissions as part of a long-term pattern of *intentional* segregation. The explanation was sufficient; the exhibits and testimony were accepted into evidence.

Some weeks before trial, Bardwell had been in the school superintendent's office asking for certain records concerning teacher assignments. The superintendent said, "Sorry, we don't keep those records."

Bardwell, who had been digging around for school records for two years, said, "Oh, yes, you do, they are right there on that shelf, in the red book behind you." Sure enough, in that red binder were the records the superintendent apparently did not even know he had, and Bardwell got them.

For two days, we kept entering Bardwell's computer printouts and Klite's enrollment summaries into evidence. Judge Doyle then began listening more intently. Over the years, every time black children in Denver had begun to spill over into the districts that were majority white, somehow the boundaries had been changed with the effect to move the blacks back into predominantly black, or segregated, districts. In effect, boundary changes had been used to resegregate. This result was always

5. Transcript, vol. II, at 185–86, Keyes v. Sch. Dist. No. 1, No. C-1499 (D. Colo. July 17, 1969) (on file with Archives, University of Colorado at Boulder Libraries).

claimed by the school district to be unintentional or accidental or the result of housing patterns. But over the years, the boundary changes were too regular and too consistent for that explanation to be credible. This school district had not become racially divided by chance.

On July 22, after all the evidence was in, Judge Doyle engaged in a colloquy with Greiner as to whether he could enter a "mandatory injunction," in effect compelling the district to take some new action. Judge Doyle said skeptically, "I haven't got the power to do that."

Without missing a beat, Greiner replied, "Oh sure you do."[6] The plaintiffs were asking, not for a mandatory injunction, but for a return to the *status quo ante*, namely the status before rescission. But on that last day of the hearing, Judge Doyle appeared to be skeptical of our request for relief.

Judge Doyle ruled orally the next day, July 23, 1969, and had somehow resolved his doubts. He said that there was credible evidence of a pattern of discrimination resulting in the division of black and Hispanic children into separate schools and that the situation had intentionally been made worse by the repeal of Resolutions 1520, 1524, and 1531.[7] He said that school construction policies, boundary changes, and the use of mobile units in segregated schools had contributed to this result. He noted that when majority-white East High School had been substantially overcrowded, neighboring black Manual High School was left partially filled. No whites were forced to attend a black school, and he noted that district boundaries tended to follow the census data, moving in concert with black migration. He granted the preliminary injunction, requiring the district to restore the status quo before the rescissions of June 9, 1969. The effect would be a partial integration of Denver's schools beginning September 1, 1969.[8]

It was a stunning victory. The school board lawyers announced immediately that they would appeal. The Tenth Circuit, as everyone knew, was conservative. It would not likely agree with Judge Doyle. Soon the circuit court announced that it could not hear the appeal until August 4, 1969. The school district replied that that would be soon enough and that it could adjust buses and teacher assignments if it were ordered to do so by that date.

On August 4, during oral argument before three judges on the Tenth Circuit, one of the judges asked the school's counsel whether Judge Doyle had considered the impact of the Civil Rights Act. The school district lawyers said, "No, Judge Doyle did not reference that Act."

6. Transcript, vol. V, at 746, Keyes v. Sch. Dist. No. 1, No. C-1499 (D. Colo. July 22, 1969) (on file with Archives, University of Colorado at Boulder Libraries).

7. Keyes v. Sch. Dist. No. 1, 303 F. Supp. 279, 287–88 (D. Colo. 1969).

8. *Id.* at 289.

"Why not?" someone on the bench asked. Of course, the school district could not tell him and didn't really want to know. Greiner was arguing the case for the plaintiffs. He must have said that the Civil Rights Act of 1965 did not apply to schools in this situation. I do remember a good argument to that effect. The three judges of the circuit court were bland, however, and seemed singularly unimpressed with his argument.

Within hours after the hearing, the Tenth Circuit panel issued an order remanding to Judge Doyle for reconsideration of his decision in light of the Civil Rights Act of 1965.

It was defeat, equally stunning to the victory of a few days before. That night, Greiner and I stayed up again, writing all night. The next morning at about 7:00 a.m., we woke up opposing counsel saying that we were filing motions immediately with Judge Doyle and that they ought to be there when court opened. Counsel mumbled some words of cautious disrespect and said that they should have a right to review our documents before any hearing. Greiner was not persuaded. At ten o'clock, two days after the adverse ruling by the Tenth Circuit, we were back in Judge Doyle's courtroom arguing that the Civil Rights Act of 1965 did not apply and that he should not change his decision.

On August 14, Judge Doyle agreed, issuing a new decision, referencing the Civil Rights Act, but saying that it did not apply and did not change his mind.[9] This case was moving forward like a train on a fast track.

The city waited. Greiner went back to being an antitrust lawyer. I went to preparing for the next round of the case when we would seek to make the preliminary injunction permanent, which we expected would occur sometime during the coming winter. It was now mid-August 1969. The school district appealed a second time, taking us back to the Tenth Circuit. This time, the hearing was set for August 22.

"That's OK," said the school district. "If we get a decision by August 22, we can still make it work." The school district counted on the circuit court as we had come to count on Judge Doyle. Each team had its own horse. Only theirs was higher up and had more authority than ours did.

Oral argument was set in the Tenth Circuit for Friday, August 22. Greiner was consumed by another trial. I would do the argument. I spent about ten days doing nothing but reading cases about school integration. I memorized the physical layout and dimensions of a dozen cities in America where integration had been ordered and where it had not been ordered. I saw where Denver's case was the same factually, and could even name the rivers and streets in Kansas City or Charlotte, the applica-

9. Keyes v. Sch. Dist. No. 1, 303 F. Supp. 289, 295 (D. Colo. 1969).

ble law in these decisions, the months, the years, and the abuses. But for all that, I obviously had never before argued a case of such importance at such a high level.

On the morning of the argument in the Tenth Circuit, the courtroom was bursting at the seams. Outside in the halls, there were crowds listening through cracks in the doors, peering through door windows. Under a strong glare of disbelief from the bench, I argued the difference between our case and others, and cited the progenitor case of all cases, *Brown v. Board of Education* (*Brown I*),[10] with knowledge of just what had gone on in Kansas City causing the U.S. Supreme Court in 1954 to change the law of the land. I kept my cool as best I could. The three inquisitors seemed very displeased to see this case again. Judge Murrah was chief judge. He was gentle, but skeptical. Judge Breitenstein, a clear opponent. When the argument was over, I was wringing wet. Later, on the streets, I passed Chief Judge Murrah, wholly by chance. He recognized me. "Nice argument, counsel," he said as we passed. I smiled, relieved. I got back to the office and told Greiner what Murrah had said.

"It's a bad sign," he said. "They only compliment you if they are going to decide against you." Another of the Holland & Hart partners stopped by the office and told me I had done an excellent job, arguing a detailed case. For me personally, that was its own small triumph. But the future did not look bright.

The next day was Friday. Everybody in Denver was waiting for a decision. There was a rumor going around town that the court had met on Thursday afternoon right after the argument and had already decided. We wanted the printed version to come out quickly because in spite of the case law in our favor, we believed we were in heavy sand before that tribunal. Furthermore, every day that they delayed made it more difficult for us to appeal to the U.S. Supreme Court.

We doubted, too, that the Tenth Circuit was neutral. We imagined that it might even delay as long as possible to make it more difficult to appeal with time enough to have any effect upon schools opening September 1.

Nothing happened that Friday. Nothing came out Saturday, though Greiner and I spent the day waiting in the Holland & Hart offices. Sunday, of course, there was no news. There was only one week remaining before schools were to open.

"That's OK," said the school district's lawyers to the Tenth Circuit. "If you give us a decision next week, at least by the end of the week, we still have time to roll back the integration plan." If they knew by August 27, that would do. Schools would open five days later.

10. 347 U.S. 483 (1954).

Greiner, Ed Kahn, and Bob Connery had begun work on a motion to file with the United States Supreme Court immediately after the August 4 hearing in the court of appeals. It was entitled, in part, "Motion to Vacate Suspension of, and to Reinstate an Order of the United States District Court . . . Ordering Partial Implementation of a School Desegregation Plan."[11] By now plaintiffs' lawyers all thought we might have a better chance in the Supreme Court than we were having in the Tenth Circuit. Our reception in that court on August 22, had done nothing to change that opinion. We would therefore not wait for that court's decision but would prepare our motion to the Supreme Court as if we already had the Tenth Circuit opinion in hand.

Monday after that August 22, argument in the Tenth Circuit, nothing happened. I remember calling the school district's lawyers. "We are sending to you our motion that we will file in the United States Supreme Court." There was silence on the other end of the line.

"How can you do that? You haven't even lost yet," someone said.

"We think we are going to lose, and we don't want you to say to the Supreme Court that you didn't have notice and a chance to respond. This gives you notice." Greiner, Kahn, and Connery on that Monday then sent the motion upon which they had been working to the school district's lawyers, two days before the Tenth Circuit's decision came down. Connery remembers that the motion went with "a couple hundred" exhibits.

By Tuesday, there was still no word. On Wednesday, Greiner and I decided to go fishing. If waiting in the office would not help, then maybe doing something frivolous would. Greiner wanted to go to the western part of the state over in the Flat Tops, above Glenwood Springs, to a river he knew high up in the wilderness area. I picked him up a little before dawn, and we drove west and got to the river by about ten o'clock in the morning. We were out in the middle of nowhere. Gordy caught a bunch of fish. I did not catch anything. At about dusk, we hiked back to the car, shucked our rods and gear, and began to load up to head home. I turned on the car radio. The six o'clock evening news was just starting. The lead story was that the Tenth Circuit had ruled that Judge Doyle was in error and had reversed. The schools would not be integrated, after all.

We finished loading the car, and I said I wanted to hurry. I hit the bends in the dirt road like a madman, skidding around dusty corners, dragging the rear end until the brakes began to smell, and Gordy said, "Easy, man, easy." When we got to our first gas station somewhere in the

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11. Motion to Vacate Suspension of, and to Reinstate an Order of the United States District Court for the District of Colorado Ordering Partial Implementation of a School Desegregation Plan, Keyes v. Sch. Dist. No. 1, 396 U.S. 1215 (1969) [hereinafter Motion] (on file with Norlin Library Archives, University of Colorado at Boulder, Wilfred Keyes v. Denver School District, 1st Accession, Box 22, Book 2, No. 23A).

middle of nowhere, we called Bob Connery in Denver. He was on it. He had been to the Tenth Circuit, obtained the opinion, reviewed it, filled in the blanks in the pre-prepared motion, had it copied, signed it, called defendants' counsel, and arranged for our filing to be hand-delivered to them. By the time we talked to Bob, he was already on his way to the airport, headed for Washington, D.C. That was Wednesday night at about nine o'clock. Schools were to open the following Monday.

When we got to Denver at about eleven o'clock that night, I dropped Greiner at his home and drove to the Holland & Hart office downtown. At the door, the night watchman looked me over and would not let me in. I was dirty from the river, scraggly from not shaving, angry looking, and said that I wanted to go upstairs to get a judicial opinion to write an appeal to the Supreme Court of the United States. He looked skeptical.

"I am a lawyer," I said.

"Sure," said his look.

"Really," I said, "and I have an urgent need to get upstairs and find out what the court of appeals did to us today. I have to work on it tonight, all night. I have to hurry."

Eventually, the guard let me in. I went up, found the opinion where Connery had left it, and took it home. During the night, I wrote a supplement to what Connery, Greiner, and Kahn had already prepared the week before, now referring to the actual language that Judge Breitenstein had used. It appeared that Judge Breitenstein had made a critical error citing the *Brown v. Board of Education* (*Brown II*) decision of 1955. He said that integration was supposed to occur "with all *convenient* speed."[12] The error was obvious: according to *Brown II*, integration was to occur "with all *deliberate* speed."[13] The difference in tone and intention was profound.

Bob Connery remembers drafting a supplement to a motion while in the airport on the way to Washington, D.C. My own recollection is that I drafted the supplement, or some substantial portion thereof, on a yellow pad in my home in the early hours of Thursday morning.[14] Thus the recollections of two close friends differ on this one.[15] At some time during

12. Keyes v. Sch. Dist. No. 1, 396 U.S. 1215, 1216–17 (1969) (emphasis added) ("It was not correct to justify the stay on the ground that constitutional principles demanded only that desegregation be accomplished with all convenient speed. 'The time for mere "deliberate speed" has run out . . . .'" (quoting Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964)) (internal quotation marks omitted)).

13. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (emphasis added).

14. Motion, *supra* note 11.

15. The pleading bears my name at the top of the list of signatories, and this is the only pleading of that summer where this is the case. In addition, much of the language is in my characteristically more dramatic style. So there is a fair chance that I am right about this one, but of course Bob's memory should be trusted too. We will perhaps not ever know the accurate account.

that Thursday morning, I called Connery. He had located a law office in Washington, D.C., that would provide administrative help. I read to him language for the supplement from my yellow pad. Whether it was substantial language or a few additions, we may not ever know. Whoever wrote it, the style was truncated, terse, and to the point:

> [The Tenth Circuit] reverses the trial court and does so without finding or stating any errors in the findings of fact or conclusions of law. No contrary finding of fact is suggested. No injury to opposing parties is cited. . . . The fundamental rights of Negro children are being denied in the interest of the vague, unidentified and uncertain community sentiment.[16]

I packed a bag and went to the airport.

Friday morning, Connery and I sat in the lawyers' lounge of the Supreme Court. Connery had been told that the case had been referred to Justice White, who was the Justice for our circuit, but that by happenstance Justice White was out of town and the case had been passed over to Justice Brennan. We waited in the lounge in case the Justices might want anything from us. Schools were to open in three days. We could not go through the usual long appeals. A circuit court, we said, was ordering the resegregation of Denver's schools. Ordering resegregation was worse than just letting it flow on unabated.

Eventually, the school district's lawyers arrived. They were unhappy. They had had to get up at an ungodly hour, write a response brief within minutes, get on the plane, and bring it to Washington, D.C., in a highly irregular and unprecedented procedure. They looked sleepless and disgruntled. Connery and I sat under a portrait of Chief Justice Hughes. Our opponents sat under portraits of Justice Field and Chief Justice Jay. Every half hour, a tour guide led a crowd of tourists through the room, speaking in hushed tones. "This is the lawyers' lounge," whispered the guide, "and these are lawyers waiting upon the pleasure of the Court." Bob and I sat up and straightened our ties.

At about 11:00 a.m., a messenger from the clerk of the Court came to us and said that Justice Brennan was writing an opinion. He would not say what the gist of the decision was. He asked that if we go out for lunch, we tell the clerk's office where we would be and suggested that we not be gone for long. We said we would not go far and would come back soon. A Supreme Court-experienced lawyer from the NAACP Legal Defense Fund flew in from New York City to be with us. If the Court wanted to talk to us, he would give us stature and wisdom. We three went to lunch in one of Washington's oak-paneled restaurants that smelled of 1776 and Thomas Jefferson. We hurried back.

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16. Motion, *supra* note 11.

A clerk's assistant came into the lawyers' lounge again and said that an opinion would be released at 3:00 p.m. Channel 4 news from Denver came to interview us on the courthouse steps, gleaming marble columns all behind. Then came Channel 7: "What decision did we expect?" We said we did not have any idea. "There have, however, been decades of discrimination, even in the North," we said, giving away a little gratuitous propaganda.

Then the television news stations interviewed the lawyers for the district. "This is egregious," they said. "There is too little time now to change the schools back to the integration mode. We have already made up the new assignments and lists for the opening on Monday."

Both sides sulked back to the lawyers' lounge. It was hot in there. Our shirts were soaking. Tour groups kept coming through. "This is the lawyers' lounge, and these are lawyers waiting upon the pleasure of the Court."

At three o'clock sharp, a messenger from the clerk's office came to the door. "The decision is ready," he said. Bob and I were nearest the door and quickly out into the marble hallway. We marched 200 feet down the echoing corridors, the sounds of our leather heels reverberating off the stone. In the clerk's office on an oak desk was a pile of clean, white printed materials. "Here," said the clerk's assistant.

Connery reached down, picked up a copy of the opinion, and we stood without breathing, reading together. Connery read faster and suddenly screamed and jumped—highly inappropriate behavior. Justice Brennan had corrected Judge Breitenstein's error about *convenient* speed.[17] The Justice ordered on behalf of the Supreme Court of the United States that Denver's schools open on the following Monday, integrated according to the provisions of Resolutions 1520, 1524, and 1531.[18]

Bob and I rushed out of the clerk's office and raced to the basement of the Supreme Court for the phones. We called Greiner, "We won!"

He already knew. The television channels in Denver were all already reporting the news.

Denver's schools would open, for that year, integrated. When we came off the plane at Stapleton International Airport in Denver, there was a crowd of people waiting and cheering. We marched down the gangway like revolutionaries from the barricades and went to someone's home in the mountains to sing and dance. We were joined by a large crowd of integration supporters who had been with the cause from the

17. *See* Keyes v. Sch. Dist. No. 1, 396 U.S. 1215, 1216 (1969) ("It was not correct to justify the stay on the ground that constitutional principles demanded only 'that desegregation be accomplished with all convenient speed.'" (quoting Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964))).

18. *Id.* at 1217.

very beginning. The phone rang about twelve o'clock midnight. Half of Denver was horrified by what we had done. Lawyers for the school district were on the line. They would be asking the circuit court the next morning, Saturday, to amend Judge Breitenstein's opinion that had simply been too hastily drafted, speaking to "convenient speed" rather than "deliberate speed." They would ask the circuit court to correct Judge Breitenstein's wording error to comply with Justice Brennan's opinion.

They hung up. We drove home, now depressed. The next morning at 7:00 a.m., I went to the Holland & Hart office and, finding the school district's midnight motion, began to type a response. For some reason, the office was almost empty. No secretaries were in the building. I corrected my typing errors with whiteout fluid. Spacing for the headings was messy. I wrote that the school district should not ask the Tenth Circuit to, in effect, overrule the Supreme Court of the United States. I filed my reply to the school district's midnight motion in the circuit court of appeals at about 1:00 p.m. There were no crowds anymore, no more cheering. If my whited-out, poorly typed response brief would take enough time to read, it might discourage the judges from quick action. Then it would be Sunday and too late. No one would work on Sunday.

The school district may have been betting that it could get an angry Judge Breitenstein to summon the rest of the court's panel on a Saturday afternoon and in effect, persuade them to maneuver around Justice Brennan's mandate. It was a gutsy call. I was banking on the hope that Judge Breitenstein's colleagues would lose their appetite. Greiner was so sure that Judge Breitenstein would not rouse the rest of the panel that he did not even come to town.

Greiner was right. The last gambit, the midnight appeal, did not work. On Monday morning, the Tenth Circuit issued an opinion denying the school district's last motion, saying that things were too far down the road and that it would be disruptive to the schools to change the plans on the last weekend before their opening. The Tenth Circuit did not concede anything to Justice Brennan on the law or acknowledge that it was bound by the Supreme Court of the United States. Instead, it focused on administrative inconvenience and backed away.

"[A] major city outside the South"[19] had finally found a hearing the highest court of the land, and one Justice had taken time to read briefs that had been hastily drafted and even more hastily submitted, had considered them in spite of their rough form, and found merit.

## III. THE TRIAL ON THE MERITS: 1970

That Monday in September 1969, according to the ruling of Justice Brennan, schools opened integrated under the directions of Resolu-

19. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 217 (1973).

tions 1520, 1524, and 1531. Justice Brennan's ruling, however, only enforced a preliminary injunction. Trial for a permanent injunction, or as we said, "on the merits," would take place in February 1970, and last for three weeks. I will not recount the full experience of that January trial. The evidence was much the same as that presented in the summer, but vastly expanded. This time, the evidence went in smoothly and plaintiffs' lawyers were optimistic.

Midway through the trial, Wilfred Keyes's front door was dynamited. Dr. Keyes and his family were not hurt, but the event was shocking and frightening for all involved in the case. Then one night in the middle of trial, approximately twenty-seven of the district's school buses were blown up. Someone had laid dynamite cord under the hoods, running from one bus to the next until all those buses went up in flames. Again, no one was hurt, but the psychological effect upon those of us trying the case was serious. We realized for the first time that we could win in court and be stymied by a resistant population. Without buses, the integration resolutions would be difficult, if not impossible, to implement. After that explosive evening, it was hard for any of us trying the case to feel optimistic.

I began to receive hate calls in the middle of the night, a practice that continued for nine years. Usually at about 2:00 a.m., some angry man would call up and say, "Get up! Time to put your little blond daughter on a bus and send her to school with all those niggers," and then hang up. One evening during the trial, I looked out my bedroom window and saw a black car slowly pausing in front of my house, as if casing the place. Wilfred Keyes's house was made of brick and did not burn up when he was bombed. My house was of wood and would certainly burn up if we too were bombed. I had four young children and a wife inside. After that, we were nervous, and friends from the COC ordered police protection for our home. Such was the nature of these times.

In February 1970, at the end of a three-week trial on the merits, Judge Doyle again ruled for plaintiffs. As the case was winding its way to the Supreme Court, I appeared one last time to argue motions in the Tenth Circuit. Later that year, more experienced counsel took over. It was they who took the case to the Supreme Court and won there in 1973.

I did not ever return to the Graduate School of International Studies at the University of Denver. In May 1970, however, following the *Keyes* trial, I announced my candidacy for U.S. Congress in the first congressional district of Colorado (Denver), contesting the seat then held by a twenty-year Democratic incumbent, Byron Rogers. The Rogers campaign did not make my participation in *Keyes* an issue, and in September 1970, I won the Democratic primary, topping Rogers by thirty-one votes. Rogers contested this slim result in the Colorado Supreme Court, which refused jurisdiction and referred the case to the U.S. Congress. A committee in Congress confirmed my victory in early October 1970.

Two weeks later and two weeks before the general election, polls showed that I enjoyed a fifteen-point lead in the race against my Republican opponent, Mike McKevitt.

The McKevitt campaign now began running full-page advertisements in the *Denver Post* and *Rocky Mountain News* featuring a facsimile of my signature on the complaint in *Keyes v. School District No. 1*. Over the next two weeks, a sustained repetition of these advertisements turned the tide; my fifteen-point lead evaporated, and in the November general election, I was defeated by roughly 10,000 votes. I did not return to politics, as I had not returned to the University of Denver, but continued to practice law for another twelve years.

Two years later, District Attorney Dale Tooley ran for mayor of Denver. He too led in that race until his opponent began to run full-page advertisements that proclaimed: "Republicans! Defeat the Tooley–Barnes bunch again!" Although Tooley had not been active in the trial of *Keyes*, he was portrayed as linked to me as counsel for the *Keyes* plaintiffs, and *Keyes* had become a metaphor for "forced, massed, cross-town bussing," a highly inflammatory phrase widely used by opponents of school integration. Tooley was also defeated. The *Keyes* case had that one more gigantic effect upon the City of Denver.

## IV. CONCLUDING OBSERVATIONS

Forty years after the Supreme Court's decision, Denver's schools are reported to have been largely resegregated.[20] When measured, therefore, in terms of long-term school integration, the *Keyes* victory may not have succeeded. The early successes appear to have been substantially vitiated by white flight. Further, when measured in terms of educational improvement, the contest over whether racial integration succeeds in raising achievement levels may also be contested. My own children eventually attended East High School in Denver and even though the school had been "integrated" in terms of the overall student population, classes at East High tended to gather students along racial lines with higher numbers of Anglos and Asians attending college preparatory classes, while blacks and Hispanics attended these classes in much fewer numbers. Whether this was a result of some continued invidious discrimination or a natural tendency of cultures to socialize together, it cannot be said that *Keyes* solved this problem.

There was, however, a victory of a different kind that may be less apparent to observers as the passions of 1968–1969 recede from memory. The country was in turmoil. Several cities had literally gone up in flames. From the standpoint of civic institutions, the *Keyes* case was

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20. *See* CATHERINE L. HORN & MICHAL KURLAENDER, CIVIL RIGHTS PROJECT, THE END OF *KEYES*—RESEGREGATION TRENDS AND ACHIEVEMENTS IN DENVER PUBLIC SCHOOLS 7 (2006).

therefore a win for an alternative approach, and it was ultimately a win for the philosophy of the country's Founders. When the first Congress of the United States met in the summer of 1789, James Madison, who had been a primary architect of the founding document, introduced amendments. These would guarantee specific rights protecting dissent and minority opinion. Letters of the time demonstrate that Madison and Thomas Jefferson agreed that there was still a need to give the courts a basis for protection against the worrisome prospect of a tyranny of the majority.[21]

It is from this perspective that *Keyes* and the Denver experience were a triumph. Racial tension has been a cauldron of dissent and disorder throughout American history. It is from that cauldron that the bombing of the Denver school buses and Dr. Keyes's house erupted. It is that deep anger that provoked hate calls that came to my house in the middle of the night for nine years after my participation in the case. As with much of America, Denver was deeply divided, emblematic of the struggle since the drafting of the Constitution itself. But one thing is clear: when this deep division is addressed violently, as in lynchings, race riots, and in the Civil War, the horror of violence drives the chasm between races even deeper.

The triumph of the *Keyes* case may not therefore ultimately have been in educational achievement or integration. It may have been even more significant that the *Keyes* litigation was an alternative to the riots of Los Angeles and Detroit and Washington, D.C. It was a nonviolent response from a people deeply and horribly damaged by the murders of Martin Luther King Jr. and many others. And it is perhaps here, as a part of history's centuries-long struggle to foster civil society, that this case is of significance. If we trace the rule of law back to the Magna Carta of 1215, it will be remembered that on that June day, the aggrieved barons were assembled in force and numbers outside the king's castle. The alternative to John's assent to the Great Charter was continued civil war. The signing of the Charter with its provision for councils of deliberation was simply an alternative to dispute resolution through combat. In that sense, democracy arose from the collective decision of those assembled to replace violence with process. By definition, and from its earliest origins, the rule of law is the choice of nonviolence over violence. When Rachel Noel and her followers chose to go to the courts and not to the barricades, that was a triumph for democracy.

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21. Madison thought, according to Pauline Maier, that

> the greatest danger lay "in the body of the people, operating by the majority against the minority." Although a "paper barrier" was notoriously ineffective against "the power of the community," insofar as a bill of rights commanded respect and favor it could "be one means to control the majority from those acts to which they might be otherwise inclined."

PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 451 (2010) (footnotes omitted) (quoting 1 ANNALS OF CONG. 458 (1789) (Joseph Gales ed., 1834)).

Looking toward the future, in the long run, the greatest danger to popular government may not even be poor education, though that is certainly a huge challenge. Of even more danger, however, may be the collective despair of a whole racial community. The *Keyes* case was an antidote to that despair. It gave hope for the pursuit of a dream beyond Martin Luther King Jr., and in a moment when the rest of the country was in flames, with Denver very close to it, a legal process was available, just as James Madison had foreseen it must be. It was available and it responded.